Supreme Court, U.S.
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No. 99-493

In The

Supreme Court of the United States

WILMORE GREEN, III and MARSHA W. GREEN,

Petitioners,

vs.

LEVIS MOTORS, INC., doing business as Levis Mitsubishi; JOHN DOES, 1-10; HANCOCK BANK OF LOUISIANA; ABC INSURANCE; XYZ INSURANCE CO.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT HANCOCK BANK OF LOUISIANA'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an assignee of a consumer credit contract, such as Respondent Hancock Bank of Louisiana ("Hancock"), can be held derivatively liable under TILA § 1641(a)[1] for a Truth in Lending disclosure violation that was not apparent on the face of the assigned documents?

2. Whether the inclusion of mandatory FTC Holder in Due Course Notice language in a retail installment sales contract has the effect of superseding the protections allowed to assignees under TILA § 1641(a)?

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[1] References to "TILA" and the "Act" refer to the Federal Truth in Lending Act, 15 U.S.C.A. §§ 1601, et seq. (West 1999). References to "Regulation Z" refer to Regulation Z of the Board of Governors of the Federal Reserve System, 12 C.F.R. §§ 226.1, et seq. (1999).

CORPORATE DISCLOSURE STATEMENT

Hancock Bank of Louisiana is wholly owned by its parent company, Hancock Holding Company.

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REASONS WHY THE PETITION SHOULD BE DENIED

I. The Law That Applies In This Case Is Clear And Free From Ambiguity; Assignee Liability Under TILA § 1641(a) Is Limited To Violations Apparent On The Face Of The Assigned Documents.

An assignee of a consumer credit contract, such as Hancock, cannot be held derivatively liable under TILA § 1641(a) for Truth in Lending disclosure violations committed by the originating dealer/creditor unless the violations were apparent on the face of the assigned documents.

> **Except as otherwise specifically provided in this subchapter, any civil action for a violation of this subchapter or proceeding under section 1607 of this title which may be brought against a creditor may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement, except where the assignment was involuntary. For the purpose of this section, a violation apparent on the face of the disclosure statement includes, but is not limited to (1) a disclosure which can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned . . .**

15 U.S.C.A. § 1641(a) (West 1999).

TILA 1641(a) was added by Congress under the Truth in Lending Simplification and Reform Act of 1980 (Act of March 31, 1980, Pub. L. No. 96-221, 1980 U.S.C.C.A.N. (94 Stat., 168-186)) (the "TIL Simplification Act") to overturn

a line of pre-simplification decisions, which held an originating motor vehicle dealer to be an arranger of credit under the transaction, with the bank or finance company purchasing the consumer's contract on an assignee basis being the true creditor. *See Meyers v. Clearview Dodge*, 384 F.Supp. 722, 725 (E.D. La. 1974), *aff'd in part, rev. in part*, 539 F.2d 511 (5th Cir. 1976), *cert. denied*, 431 U.S. 929 (1977); *Cenance v. Bohn Ford*, 621 F.2d 130, 133 (5th Cir. 1980), *aff'd in part, rev. in part*, 452 U.S. 155 (1981). Congress effectively superseded this line of pre-simplification decisions by amending the definition of *"creditor"* under TILA § 1602(f) to provide that the originating dealer to whom a consumer credit contract is initially payable, is the originating creditor under the transaction, and the party solely responsible to make required Truth in Lending disclosures. 125 Cong. Rec. S. 108 (daily ed. May 1, 1979), at p. 9160; and Sen. Rep. No. 96-73 at 10 (1979), *reprinted in*, 1980 U.S.C.C.A.N. 280, 287; *see also* Regulation Z § 226.2(a)(17); *see additionally Riviere v. Banner Chevrolet*, 184 F.3d 457, 461 (5th Cir. 1999). The assignee status of a bank or finance company purchasing a consumer credit contract from an originating dealer/creditor is further explained in the Federal Reserve Board's Official Staff Commentary to Regulation Z at ¶ 2(a)(17)(i).

Congress additionally added TILA § 1641(a) to provide that a bank or finance company purchasing a consumer credit contract on an indirect assignment basis may be held derivatively liable for Truth in Lending disclosure violations committed by the originating dealer/creditor only to the extent that the alleged violations were *"apparent on the face of the disclosure statement and other documents assigned."* (emphasis added) Sen. Rep.

No. 96-368, at 32-33 (1979), *reprinted in* 1980 U.S.C.C.A.N. 236, 268.

When enacting TILA § 1641(a), Congress declined to impose an affirmative duty on an assignee to investigate or independently verify whether the information disclosed in the assigned documents was in fact correct and accurate. As pointed out by the United States Court of Appeals for the Seventh Circuit in *Taylor v. Quality Hyundai*, 150 F.3d 689, 694 (1998), *"[T]his is the very kind of duty that the statute precludes, by limiting the required inquiry to defects that can be ascertained from the face of the documents themselves.*** We hold that § 1641(a) does not impose a duty of additional inquiry on assignees."* (emphasis added). *See also Walker v. Wallace Auto Sales*, 155 F.3d 927, 935-36 (7th Cir. 1998); *Ellis v. General Motors Acceptance Corporation*, 160 F.3d 703, 709-710 (11th Cir. 1999).

In rejecting Petitioners' actual knowledge argument, the Fifth Circuit in this case, *Green v. Levis Motors*, 179 F.3d 286 (1999), followed the Seventh Circuit's prior holding in *Taylor, supra*, and the Eleventh Circuit's prior holding in *Ellis, supra*, and stated as follows:

> [The district] court held that the violation alleged by the Greens was not apparent on the face of the RIC. [retail installment contract] In following several other district court decisions, the district court stated that § 1641(a) establishes an objective test to determine the liability of assignees. Thus, the court refused to consider Hancock's substantive experience and also refused to read § 1641(a) as requiring Hancock to look to the Louisiana tables.

> The district court was correct. The only "assigned" document that the Greens point to is the RIC. Although Louisiana's fee tables may be available to the public, those tables do not constitute, according to § 1641(a)'s text, "documents assigned" to Hancock.

Green, 179 F.3d at 295.

Additional decisions properly limiting assignee liability under TILA § 1641(a) include: *Smith v. Highland Bank*, 915 F.Supp. 281, 290 (N.D. Ala. 1996), *aff'd*, 108 F.3d 1325 (11th Cir. 1997); *Johnson v. Fleet Finance, Inc.*, 785 F.Supp. 1003, 1011-12 (S.D. Ga. 1992); *Hoffman v. Grossinger Motor Corp.*, 1997 WL 793316, *9-10 (N.D. Ill. 1997).

II. The FTC Holder Rule Does Not Create Independent TIL Assignee Liability.

As a result of the Federal Trade Commission's Preservation of Consumer Claims Rule (16 C.F.R. § 433.1 et seq.) (1999) (the "Holder Rule"), every consumer retail installment sales contract is required to contain the following notice:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED THE AMOUNT PAID BY THE DEBTOR HEREUNDER.

This mandatory notice conflicts with TILA § 1641(a), which again limits an assignee's TILA derivative liability to only those disclosure violations that are apparent on the face of the assigned documents. The vast majority of courts that have considered this conflict, including the Fifth Circuit in *Green*, have held that the FTC Holder Rule, which is a regulation, does not have the effect of superseding TILA § 1641(a), which is a federal statute enacted by Congress. *Vietnam Veterans of America, Inc. v. Guerdon Industries, Inc.*, 644 F.Supp. 951, 961-62 (D. Del. 1986); *Shepeard v. Quality Siding & Window Factory, Inc.*, 730 F.Supp. 1295, 1301 (D. Del. 1990); *Lindsey v. Ed Johnson Oldsmobile, Inc.*, 1996 WL 411336, *3 (N.D.Ill. 1996); *Kinzel v. Southview Chevrolet Co.*, 892 F.Supp. 1211, 1217 (D. Minn. 1995); *Cemail v. Viking Dodge, Inc.*, 982 F.Supp. 1296, 1300 (N.D.Ill. 1997); *Alexander v. Continental Motor Werks, Inc.*, 1996 WL 79403, *2 (N.D.Ill. 1996); *Hoffman*, 1997 WL 793316, *10-11 (N.D. Ill. 1997).

As stated by the district court in *Alexander, supra*:

> [T]he plaintiffs in effect argued that language required by the Federal Trade Commission

("FTC") in Retail Installment Contracts ("RIC") overrides section 1641(a) of the Truth in Lending Act ("TILA"), thus creating liability even where the alleged violation is not apparent on the face of the RICs. The standard contractual provision at issue provides that any holder is "subject to all claims and defenses" which the consumer has against the seller, limited to the amounts paid by the consumer. The language is required by FTC rules to be included in all consumer credit contracts.*** According to FTC commentary, the purpose of the FTC rule is to preserve a consumer's claim "to defeat or diminish the rights of a creditor to be paid" where the seller has failed to keep his side of the bargain.*** It is not the stated purpose of the rule to override the express language of federal statutes such as TILA, or to create claims for consumers that are otherwise precluded by statute.

In section 1641(a) of TILA, Congress expressly chose not to impose liability upon assignees who do not have notice of a TILA violation at the time of the assignment based on the documents assigned.*** The RIC language on which the plaintiffs here rely is present in every contract, and, accepting the plaintiffs' argument, would effectively impose liability upon an assignee regardless of whether the violation was apparent under section 1641(a). Such a result would be contrary to the congressional intent behind section 1641(a), effectively elevating an FTC regulation over the language of TILA and making that portion of TILA which pertains to assignee liability superfluous.

Alexander, 1996 WL 79403, *2.

This holding of *Alexander* was adopted by the district court in *Turner v. II Diamond Motors, Inc.*, U.S.D.C., M.D. La., Case No. 96-336-B-M1 (1997), *see* Petitioners' Appendix C, p. 15, and was again adopted by the same district judge in *Green*. *See* Petitioners' Appendix B, pp. 15-16. *Turner* and *Green* are related cases, and included similar claims brought before the same district judge, and involving the same counsel.

Petitioners' Holder Notice argument was uniformly rejected by the Seventh Circuit in *Taylor* and in *Walker*, by the Eleventh Circuit in *Ellis*, and again by the Fifth Circuit in *Green*. As stated by the Fifth Circuit:

> Finally, the Greens invoke the FTC clause *** of their RIC to argue that Hancock remains liable for Levis Motors' TILA violations regardless of § 1641(a)'s limitations. Because this clause is in a contract between two parties, the Greens argue, the court should give it its full effect. This argument becomes problematic, however, because giving this clause the full effect of its language would in every consumer credit contract negate the protections that § 1641(a) provides for the assignee; this is so because the FTC requires creditors to insert the FTC clause in all consumer credit contracts. See 16 C.F.R. § 433.2 (1999). This situation leaves our court with two options: (1) apply the clause so as to negate the effect of TILA's specific statutory provisions; or (2) conclude that § 1641(a) overrides a clause (required by another agency) in a private contract. Both the Seventh and Eleventh Circuits have addressed this problem and both courts had little problem concluding that § 1641(a) overrides the contract clause. *Taylor*, 150 F.3d at 692-694; *Ellis*, Id. at 708-09.

Green, 179 F.3d at 295-96; *see also Walker*, 155 F.3d at 934-35.

III. There Is No Split In The Circuits Requiring Review By This Court.

The three Federal Circuit Courts of Appeal that have considered the above issues – the Seventh Circuit in *Taylor* and in *Walker*, the Eleventh Circuit in *Ellis*, and the Fifth Circuit in *Green* – have uniformly held that: (a) an assignee of a consumer credit contract cannot be held derivatively liable under TILA § 1641(a) for Truth in Lending disclosure violations committed by the originating dealer/creditor that were not apparent on the face of the assigned documents; (b) an assignee has no affirmative duty to look beyond the assigned documents to inquire or verify whether the disclosed information is correct or accurate; and (c) inclusion of the mandatory FTC Holder Notice in a consumer credit contract does not have the effect of subjecting an assignee to greater liability for Truth in Lending disclosure violations committed by the originating dealer/creditor beyond those otherwise actionable under TILA § 1641(a).

As the Federal Circuit Courts of Appeal have consistently applied TILA § 1641(a) to the above effects, there is no compelling reason for the Supreme Court to grant a writ of *certiorari* in this case.

IV. There Is No Compelling Public Policy Reason For This Court To Grant A Writ Of *Certiorari*.

The issue before the Court – that being, the extent of an assignee's derivative liability for Truth in Lending disclosure violations committed by the originating dealer/creditor – was resolved by Congress under the 1980 TIL Simplification Act. After five years of hearings and debate, Congress decided as a matter of policy to limit an assignee's derivative TILA liability to only those disclosure violations that were apparent on the face of the assigned documents, without the assignee being obligated to conduct an additional inquiry or investigation to determine whether the disclosed information was correct or accurate. As this Court has repeatedly stated, it is not the proper role of the judiciary to second-guess policy decisions by the legislative branch of government, other than in limited circumstances when constitutionally guaranteed rights are in jeopardy. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 211 (1997); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *Harisiades v. Shaughnessy*, 342 U.S. 580, 590 (1952).

PERCEIVED MISSTATEMENTS OF LAW AND FACT

The following are perceived misstatements of law and fact contained in Petition For Writ of *Certiorari*.

V. Mischaracterization Of The Fifth Circuit's § 1641(a) Holding.

Misstatement: Petitioners mischaracterize the Fifth Circuit's TILA § 1641(a) holding in *Green*. As stated by Petitioners, "The Fifth Circuit found that it [the alleged overstatement of the license fee paid to the state] was not apparent on the face of the [assigned] document even if [though] Hancock (1) knew that the disclosure was false and (2) had ready access to the official license fee tables, which set the amount of the fee." (Petition, p. 5).

Correction: The Fifth Circuit did not find that Hancock independently knew or should have known of the alleged violation. To the contrary, the Fifth Circuit affirmed the district court's holding that Hancock was not required to look beyond the four corners of the assigned documents to determine if there was a violation. As stated by the Fifth Circuit: "The district court was correct. The only 'assigned' document that the Greens point to is the RIC. Although Louisiana's fee tables may be available to the public, those tables do not constitute, according to § 1641(a)'s text, 'documents assigned' to Hancock." *Green*, 179 F.3d at 295.

VI. There Is No Evidence That Hancock Independently Knew Of The Dealer Upcharge.

Misstatement: Petitioners insinuate that, irrespective of whether the alleged disclosure violation was apparent on the face of the assigned documents, Hancock independently knew that the amount of license fees that Levis charged Petitioners, and as disclosed in the Itemization of Amount Financed portion of the assigned contract, was in

excess of the amount actually paid to the state. (Petition, pp. 6, 8-12, 18).

Correction: There is no proof in the record of this case that Hancock independently knew that Levis was retaining a portion of the disclosed licensed fee in the form of a dealer upcharge. Petitioners failed to present evidence before the district court to support this contention. For this additional reason, the district court rejected Petitioners' actual knowledge argument, adopting the same court's prior holding in the related *Turner* case. *See* Petitioners' Appendix B, p. 16. As stated by the district court in *Turner*:

> [The plaintiff] has cited no evidence supporting his assertion that [the assignee] knew about [the] alleged misrepresentation – that the license fee was $36 and not $110. '[T]he bare allegation that actual knowledge, unsupported by any factual assertions, fails to state a TILA claim for assignee liability under § 1641(a).' McPhan v. Geo. R. Gibson Chevrolet, Inc., 1996 WL 685449 (N.D. Ill. Nov. 25, 1996) (citing Alexander, 1996 WL 79403 at 6). *** Furthermore, [the plaintiff] has produced no evidence that [the assignee] had actual knowledge of the alleged inaccurate disclosure of the $110 "license fee."

See Petitioners' Appendix C, p. 13.

Petitioners do not appeal the above holding to the Fifth Circuit, and are precluded from arguing before this Court that Hancock knew of the alleged violation.

VII. *Taylor* And *Ellis* May Not Be Distinguished.

Misstatement: Petitioners argue that the facts and circumstances of this case may be distinguished from those considered by the Seventh and Eleventh Circuits in *Taylor* and *Ellis*. (Petition, pp. 11-12).

Correction: The Fifth Circuit specifically rejected Petitioners' distinction argument, holding: "The fact that *Taylor* and *Ellis* involved payments to third parties for extended warranty services – as opposed to state licensing fees – is a distinction that has no effect." *Green*, 179 F.3d at 295.

VIII. Congress Rather Than The Fifth Circuit Limited The Ability Of Petitioners To Assert A Truth In Lending Claim Against Hancock.

Misstatement: Petitioners blame the Fifth Circuit for limiting their ability to assert a Truth in Lending claim against Hancock. (Petition, pp. 6, 12, 18).

Correction: Petitioners' assessment of blame is misplaced. As previously mentioned, Congress made a policy decision under the 1980 TIL Simplification Act to limit the liability of banks and finance companies purchasing consumer credit contracts on an indirect assignment basis, to only those disclosure violations committed by the originating dealer/creditor that are apparent on the face of the assigned document. The district court and the Fifth Circuit merely applied the law (TILA § 1641(a)) as written and intended by Congress.

IX. Truth In Lending Should Be Restrictively Rather Than Liberally Construed By The Courts.

Misstatement: Petitioners argue that the Fifth Circuit erred in failing to liberally construe TILA and Regulation Z in favor of borrowing consumers and against creditors, as required under prior decisions of this and other courts. (Petition, pp. 6, 12-13).

Correction: This statement totally ignores and directly contradicts the legislative history and stated congressional intent under the 1980 TIL Simplification Act.

Over the course of hearings on the need for Truth in Lending simplification and reform, Congress found that the tendency of certain courts to liberally construe and expand upon the disclosures requirements of the original (1968) Act and Regulation had resulted in disclosures of such length and complexity as to produce a form of *"informational overload"*, which actually had the counterproductive effect of inhibiting a consumer's ability to effectively comparison shop for credit. Sen. Rep. No. 96-73 at 2-3, 7 (1979), *reprinted in*, 1980 U.S.C.C.A.N. 280, 280-282, 285; Sen. Rep. No. 95-720 at 2-3, 6 (1978); 123 Cong. Rec. S. 3875 (daily ed. Oct. 1, 1976), p. 34669; 125 Cong. Rec. S. 108 (daily ed. May 1, 1979), p. 9159.

As the three key components of the 1980 TIL Simplification Act, Congress expressly stated that it was amending TILA: (1) to simplify Truth in Lending by limiting required disclosures to only those essential items that Congress deemed to be truly meaningful to borrowing consumers when comparison shopping for credit; (2) to make compliance easier by directing the Federal Reserve Board to draft model forms and to issue an Official Staff

Commentary on which creditors could rely with immunity; and (3) to limit TILA § 1640(a)(2) civil money penalties "to only those disclosures which are of material importance in credit shopping," thereby eliminating litigation "based on purely technical violations of the act." Sen. Rep. No. 96-368 at 31 (1979), *reprinted in*, 1980 U.S.C.C.A.N. 236, 267; see *also* 124 Cong. Rec. S. 1312 (daily ed. Apr. 20, 1977), pp. 11332-11333.

The importance of this expressed statement of congressional intent that the Act and Regulation Z be restrictively, rather than liberally construed by the courts, cannot be overstated. As noted by Justice Brennan in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 567 (1980), "[J]udges are not accredited to supercede Congress or the appropriate agency by embellishing upon the regulatory scheme." Rather, "language of the legislative history [referring to the then pending 1980 TIL Simplification Act] evidences a decided preference for resolving interpretive issues by uniform administrative decision rather than piecemeal through litigation." *Id.* at 568. Therefore, "judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not [demonstrably] irrational." *Id.*

Unfortunately, certain courts continue under the mistaken impression that, as a remedial statute, TILA must be liberally construed in favor of borrowing consumers and against creditors, totally ignoring Justice Brennan's directive in *Milhollin*, and further ignoring stated congressional intent under the 1980 TIL Simplification Act. Post simplification cases holding to this effect are wrong, and have resulted in the same types of judicial over

extensions of Truth in Lending that prompted Congress to simplify the Act in 1980.

X. TILA § 1640(a)(2) Civil Money Penalties May Not Be Awarded For Failure To Disclose A Dealer Upcharge; Recovery Limited To Proven TILA § 1640(a)(1) Actual Damages.

Misstatement: Petitioners overstate the importance of dealer upcharge disclosures, falsely implying that failure to separately itemize and disclose the existence of a dealer upcharge may result in the originating dealer/creditor and its assignee each being subject to TILA § 1640(a)(2) civil money penalties. (Petition, p. 14).

Correction: Failure to disclose the existence of a dealer upcharge is not the type of Truth in Lending disclosure violation that will give rise to an action for TILA § 1640(a)(2) civil money penalties. Civil money penalties are limited only to those specific disclosure violations listed in TILA § 1640(a)(3) that Congress deemed to be "of material importance in credit shopping." *See* Sen. Rep. No. 96-368 at 31 (1979), *reprinted in*, 1980 U.S.C.C.A.N. 236, 267. Conspicuously absent from TILA § 1640(a)(3)'s list of actionable violations is a violation of the Itemization of Amount Financed disclosure requirements of TILA § 1638(a)(2)(B), as implemented under Regulation Z § 226.18(c)(1). Dealer upcharge disclosures exclusively fall within these two sections.

Contrary to what Petitioners may imply, an aggrieved consumer has no right to recover TILA

§ 1640(a)(2) civil money penalties as a result of a creditor's failure to individually itemize and disclose the existence of a dealer upcharge. An aggrieved consumer's right of recovery is limited to proven actual damages under TILA § 1640(a)(1). Truth in Lending actual damages are extremely difficult, if not impossible, to prove, and require proof of detrimental reliance and resulting monetary injury. *Adiel v. Chase Federal Savings and Loan Assoc.*, 630 F.Supp. 131 (S.D. Fla. 1986), *aff'd*, 810 F.2d 1051 (5th Cir. 1987). For this reason, Truth in Lending actual damage claims may not be certified as a class action. *See Castano v. American Tobacco*, 84 F.3d 734, 745 (5th Cir. 1996).

CONCLUSION

For the above reasons, the Petition For Writ of Certiorari should be denied by this Court.

Respectfully submitted this 22nd day of October, 1999.

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